DIXIE FUELS CO.

IBLA 92-361 Decided May 9, 1995

Appeal from a decision of Administrative Law Judge David Torbett affirming Cessation Order No. 90-81-415-01 issued for conducting surface coal mining operations within 300 feet of occupied dwellings. NX-91-17-R.

Affirmed.

1. Administrative Authority: Generally--Surface Mining Control and Reclamation Act of 1977: Inspection: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

Where the Board reverses a decision by OSM under 30 CFR 842.15 declining to order a Federal inspection, the Board's authority is limited to ordering such inspection. Upon completion of the inspection, it is within OSM's authority to determine whether enforcement action is warranted.

APPEARANCES: James S. Greene, Jr., Esq., Harlan, Kentucky, for Dixie Fuels Company.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Dixie Fuels Company (Dixie) has appealed an April 10, 1992, decision of Administrative Law Judge David Torbett affirming Cessation Order (CO) No. 90-81-415-01. The facts leading up to the present appeal are not in dispute.

In 1983, Dixie's predecessor-in-interest, V&C Coal Company (V&C) applied for a State permit to conduct a surface coal mining operation in Harlan, Kentucky. Shortly thereafter the Office of Surface Mining Reclamation and Enforcement (OSM), U.S. Department of the Interior, received a citizens' complaint by residents of Harlan County (Citizens Group) who live on or own property less than 300 feet from a road allegedly used by V&C in furtherance of the surface coal mining operation. The Citizens Group complaint alleged that the operation was unlawful under Kentucky Administrative Regulation 405 KAR 24:040 § 2(5) (see also KRS 350:085(3); 30 U.S.C. § 1272(e)(5) (1988)) which prohibits surface coal

mining operations within 300 feet of occupied dwellings, subject to valid existing rights (VER) unless the residents waive their right to the protective buffer zone.

On July 11, 1986, OSM issued a Ten-Day Notice (TDN) to the State of Kentucky regulatory authority, the Kentucky Natural Resources and Environment Protection Cabinet (Cabinet), in accordance with section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1988), alleging that V&C had failed to have the haul road permitted and was conducting surface coal mining operations within the 300-foot buffer zone without the residents' written waiver (Respondent's Exhs. R-3, R-6). No written response to the notice was received by OSM from the Cabinet within 10 days. Nonetheless, OSM notified the complainants on August 19, 1986, that it intended to suspend further investigation of their complaint until a pending hearing before the Cabinet involving V&C was concluded. See W. E. Carter, 116 IBLA 262, 263 (1990). On April 8, 1987, the hearing officer recommended that the Cabinet reverse approval of the V&C permit, which she found had been improperly issued. On April 30, 1987, however, the Secretary of the Cabinet, without explanation, entered an order approving the V&C permit, contrary to the hearing officer's decision (Judge Torbett Decision at 2; Respondent's Exh. R-5; W. E. Carter, 116 IBLA at 265). On May 5, 1987, the Citizens Group urged OSM to "resurrect the ten-day notice and take action to enforce the mining laws." In an August 3, 1987, decision, OSM accepted the Cabinet's response as appropriate and declined to order a Federal inspection under its oversight authority.

The record reveals that the Citizens Group appealed the Cabinet's decision approving permit issuance to the Franklin County Circuit Court in Kentucky, which issued three separate orders. The first and second orders reversed the Cabinet's decision for insufficient evidence and remanded the action to the Cabinet for an order awarding costs and attorneys' fees (Respondent's Exh. R-7). The Cabinet and V&C appealed those orders to the Kentucky Court of Appeals which dismissed the appeal finding that the district court's orders were not final, appealable orders (Respondent's Exh. R-7). The matter came before the circuit court again in October 1990 after a permit renewal application was filed. The court's third order permitted the Cabinet to proceed with processing the renewal application but forbade V&C and its successors and assigns from conducting mining operations under the permit "until such time as this action is finally concluded" (Respondent's Exh. R-8).

The Citizens Group also appealed OSM's August 3, 1987, decision declining to order a Federal inspection to this Board, resulting in our decision in W. E. Carter, supra. The Board reversed that decision, noted that nothing in the record supported the Cabinet's reversal of the State hearing officer's finding that the road did not qualify as a public road, and remanded the case to OSM to perform a Federal inspection.

On remand, OSM notified the Cabinet that the former would conduct a Federal inspection unless the Cabinet conducted its own inspection within 5 days (Respondent's Exh. R-2). The Cabinet declined to inspect. OSM inspector Sherwin Osborne inspected the permit area on November 29, 1990. He discovered that a section of the mine access road was unpermitted and issued CO No. 90-81-415-01 (Respondent's Exh. R-3) at issue herein.

An informal conference was held at the site before OSM hearing officer Gary Hall who sustained the CO on December 5, 1990. Dixie filed an application for review of the CO on December 27, 1990. The application for review was docketed by the Hearings Division (NX-91-17-R) and, after a hearing, Administrative Law Judge David Torbett on April 10, 1992, affirmed the CO. This appeal ensued.

Dixie raises two arguments on appeal. First, it argues that the CO issued by OSM is invalid because neither it nor its predecessor, V&C, were notified pursuant to 43 CFR 4.1283(a) that the Citizens Group had appealed OSM's decision not to pursue Federal enforcement action. Dixie asserts that failure to join it and V&C as parties to the appeal pursuant to 30 CFR 842.15(d) deprived the Board of jurisdiction. In support of its position, Dixie relies on Moose Coal Co. v. Clark, 687 F. Supp. 244, 247 (W.D. Va. 1988), reversing Virginia Citizens for Better Reclamation, 82 IBLA 37, 91 I.D. 247 (1984).

We disagree. Moose Coal Co. v. Clark, does not control the disposition of this case because each stands on a different procedural footing. As noted above, the Board in W. E. Carter simply reversed OSM's August 3, 1987, decision declining to order a Federal inspection and ordered a Federal inspection.

In Moose Coal, on the other hand, the Board did not merely order an inspection. Rather, it ordered OSM to issue a CO and assess a civil penalty. In reviewing this decision, the district court, while recognizing that neither the permittee nor the operator was identified as a statutory party in 43 CFR 4.1105(a)(2), nonetheless found the permittee to be the equivalent of a statutory party because the permittee in that case was the "entity whose fate is being decided." It reached the conclusion that the permittee was an "entity whose fate is being decided" because the Board went beyond affirming OSM's decision ordering a Federal inspection by purporting to issue a CO. Had the Board merely ordered a Federal inspection in Virginia Citizens for Better Reclamation, supra, a different result would no doubt have obtained. This is what occurred in W. E. Carter. We hold that where the Board reverses a decision by OSM under 30 CFR 842.15 declining to order a Federal inspection, the Board's authority is limited to ordering such inspection. Upon completion of the inspection, it is within OSM's authority to determine whether enforcement action is warranted.

The argument that a 30 CFR 842.15(d) review proceeding decides the fate of the permittee or operator where the Director orders an inspection or the Board reverses the Director and orders a Federal inspection, as in W. E. Carter, misconstrues 30 CFR 842.15(d). Where review is sought of a decision not to inspect pursuant to 30 CFR 842.15(d) what is being challenged is the determination of the Director of OSM or his designee not to order a Federal inspection. The focus of the proceeding is on OSM's lack of action. No Notice of Violation (NOV) or CO have issued as no inspection has been taken at this juncture. Although participation by the permittee or operator is permissible and properly granted should intervention be sought pursuant to 43 CFR 4.1105(b), neither the Act nor regulations make the permittee or operator a statutory party to a 30 CFR 842.15(d) proceeding reviewing a decision not to inspect.

Should the Director decide not to order a Federal inspection in response to a citizen complaint, neither the permittee nor operator is adversely affected. Should the citizen appeal that decision and the Board affirm, the permittee or operator remains unaffected. However, should the Board reverse, a Federal inspection will be ordered. Should that inspection result in the issuance of an NOV and/or CO, the permittee or operator is adversely affected and is a statutory party to administrative review proceedings challenging the NOV or CO pursuant to 43 CFR 4.1105. As such, the permittee or operator has a full and fair opportunity to litigate the enforcement action before an Administrative Law Judge. An appeal by regulation is provided as well to this Board.

That the permittee or operator is not adversely affected by a decision of the Director of OSM ordering a Federal inspection or a decision of the Board reversing the Director and ordering a Federal inspection is evident from the fact that 30 CFR 842.15 provides no appeal rights to the permittee or operator. The Department's response to comments on proposed changes to 30 CFR 842 tracks our conclusion here.

> One commentator suggested editorial changes to paragraph (a) to track more closely the language of section 517(h)(1) of the Act, and two other commentators supported the appeal provisions of paragraph (d). One of these commentators stated that the final preamble should clarify that the right to appeal does not grant a permittee the right to appeal a decision to inspect.
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> OSM believes that the language of § 842.15 is sufficiently clear and in accordance with the Act so as to render further changes unnecessary. OSM agrees with the comment that a permittee does not have the right to appeal a decision to inspect its operations, since a decision to inspect or enforce does not in itself adversely affect a permittee; the permittee is protected, however, because if an enforcement action is taken

during an inspection, the permittee will have appeal rights in respect to that action.

47 FR 35620, 35629 (Aug. 16, 1982).

Neither Dixie nor its predecessor, V&C, was a statutory party or the equivalent of an indispensable party to the 30 CFR 842.15(d) review proceeding in W. E. Carter where the Board, consistent with its authority, reversed OSM's decision and ordered a Federal inspection. Where the Board merely orders a Federal inspection, we decline to find that the permittee or operator is a statutory party or the equivalent of an indispensable party to 30 CFR 842.15(d) review proceedings.

In its second argument, Dixie asserts that State court proceedings, specifically those instituted by the Citizens Group in the Franklin County Circuit Court in 1987, preempted jurisdiction of the Board in W. E. Carter. Those proceedings, it contends, are still pending. Judge Torbett dismissed Dixie's contention, stating:

> In addition to lack of notice, Dixie charges that this tribunal can not review this matter because jurisdiction lies only with the state courts where the Citizens Group first challenged the permit. Dixie is incorrect because the Franklin Circuit Court specifically retained jurisdiction only over the matter of attorneys fees in its second order.

(Decision at 7).

Responding to Judge Torbett's finding, Dixie on appeal reasons "of course, if the decision of the Franklin County Circuit Court is not a final, appealable decision, it is interlocutory and, as such, the Franklin Circuit Court still has jurisdiction of the subject matter and of the parties" (Statement of Reasons at 3). In support of its contention that the Board was required to defer action, Dixie relies on Gillis v. Keystone Mutual Casualty Co., 172 F.2d 826, 829 (6th Cir. 1949), which holds that where concurrent jurisdiction exits, the "tribunal whose jurisdiction first attaches holds it to the exclusion of others until its duty is fully performed and the jurisdiction involved is exhausted."

We do not find Gillis controlling here. Dixie does not dispute Judge Torbett's finding that at the time the Board asserted jurisdiction in W. E. Carter, supra, the Franklin County Circuit Court had fully resolved the case on the merits, including the public road issue. The court retained jurisdiction for the limited purpose of awarding attorneys fees. No error has been shown in Judge Torbett's conclusion that retention of jurisdiction for this limited purpose did not preempt jurisdiction of the Board in W. E. Carter.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge David Torbett is affirmed.

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John H. Kelly
Administrative Judge

I concur:

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James L. Burski
Administrative Judge